Supreme Court of the United States

OCTOBER TERM, 1936.

No. 329

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

JOHN J. GILES,

Petition for Rehearing.

NAT L. HARDY,
WILL A. MORRISS,
San Antonio, Texas,
Attorneys for Respondent, John J. Giles.

LODOVIC PRINTING CO., SAN ANTONIO, TEXAS

TABLE OF CASES CITED.

Board vs. Rollins, 130 U. S. 662 8

Cochran vs. United States, 157 U. S. 287 3
Crooks vs. Harrelson, 282 U. S. 55 8

Denn vs. Reid, 10 Peters, 524 9

Fasulo vs. United States, 272 U. S. 620 9

Morse vs. United States, 174 Fed. 539 12

United States vs. Corbett, 215 U. S. 233 8
United States vs. Goldenberg, 168 U. S. 95 9
United States vs. Sheldon, 2 Wheat. 119 9
United States vs. Standard Brewery, 251 U. S. 210 9
United States vs. Weitzel, 246 U. S. 533 9
United States vs. Wiltberger 5 Wheat. 76 8

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 329

THE UNITED STATES OF AMERICA, PETITIONER,

vs.

JOHN J. GILES,

Petition for Rehearing.

TO THE SUPREME COURT OF THE UNITED STATES
AND TO THE JUDGES THEREOF:

Comes John J. Giles, respondent, and presents this his petition for rehearing of the above cause, and, in support thereof, respectfully shows:

1. This Honorable Court erred in reversing the judgment of the Circuit Court of Appeals and affirming that of the District Court.

2. This Honorable Court erred in holding that under the facts proved the District Court did not err in denying respondent's motion for directed verdict of not guilty.

3. This Honorable Court erred in finding and holding that the entries in question in the individual ledger accounts were the necessary result of respondent's action in withholding the deposit slips.

4. This Honorable Court erred in holding that the statute which penalizes one "who makes any false entry" includes an act which does not cause entry to be made, but which causes merely the falsity of an entry when subsequently independently made by another.

Your Honors will not fail to accord to counsel utmost sincerity when we say the indulgence asked for rehearing is with no purpose of delay, but only in the most earnest belief we may manifest the grave errors we assert. It is to be admitted we have thus far failed to enforce understanding of our view of either the undisputed facts, or of the applicable law. But it will be conceded the novel and elusive question is such as to challenge the most painstaking consideration for correct conclusion, else we should not have contrary conclusion, after long study of the subject, by such able minds, expert in criminal law, as those of the author of the long accepted McClarty decisions, and of the majority of the Fifth Circuit. Convinced, therefore, that the conclusions reached and the interpretation put upon the statute, by this Court, are demonstrably incorrect, incompatible with accepted rule and precedent, and plain statute, we crave the most earnest consideration of what shall be said in this motion in fewest words we may employ.

The opinion is wrong, we respectfully submit, in the following controlling respects:

1. Wherein it holds the act of respondent, to-wit, "the withholding—and failure to turn over to the bookkeeping department in the usual course of the bank's business, a deposit slip," in consequence of which the uninformed bookkeeper innocently made his entry omitting account of the

withheld deposit, is within the statute which penalizes the *making* of false entry. Such holding not only reverses the statute itself, and makes it say what it does not express, but reverses as well the express previous pronouncement of this Court in construing the statute.

In Cochran vs. United States, 157 U. S. 287, in construing this statute, this Court thrice repeated its conclusion as to just what this statute penalizes, for the express purpose of making plain exactly the contrary of what the instant opinion holds. This Court there said:

> "The penalty imposed by section 5209 *is affixed to the one who makes* the false entry." "The *offense* is in *making* the false entry." "* * the penalty is affixed to the *making* of the false entry."

This means, can mean only, that the *offense* is in the *making* of an *entry which is false*,—the *making* is the thing denounced,—*not* the making *false* (rendering false) of another's entry. The statute is *not*, does not say, "any employe *who shall make* an entry *false*"; but rather, "who shall *make a false entry.*" This needs no argument to be understood, even if the Cochran decision had not made the definite and repeated pronouncement for the very purpose of enforcing recognition of the broad distinction. To cover the case of one whose act is *not* the *making* of the entry itself, but an act which *renders false* the entry made by another, we must read into the statute a clause which it does not contain, and which the Cochran decision says it does not mean,—which we know perverts and exactly reverses its meaning. Yet, by the instant decision, Your Honors say the offense is not in the making of false entry, but is in making *false* an entry—*rendering false* an entry—to be afterwards independently made by another. In other words, Your Honors now interpret the statute to say, or

include, "any employe who shall *be responsible* for the *falsity* of an entry made by another"; "any employe who shall *cause to be false* an entry later innocently made by another"; "any employe who shall do an act which shall *result in falsity* of an entry later made by another"—shall be guilty. Nothing short of so remarkable an interpretation can by possibility hold the act of respondent penal.

Let it be plainly understood we make no contention that to be guilty under the statute one must have personally made the entry. To the contrary, we are in accord with those decisions which hold that one who *caused* an entry to be made may be as guilty as if he had written it himself. But we say this is so on authority of the law of principals, and on no other doctrine; and this court has not attempted to say respondent is shown to have been principal in the making of the entries in question.

So, before we may uphold conviction, we must either find in the record as a fact that respondent did *more* than *cause another's entry to be false,*—that this statute positively does not cover—we must find he caused the *entry itself* to be made. Yet it is demonstrable the act of respondent in withholding and failing to turn over the deposit slip did *not* cause the *entry to be made,* but caused only the *entry to be false,* when it was later independently and innocently made by another. That his act in withholding the slips caused the entry, when it was later made by the innocent bookkeeper, *to be false* is an undisputed fact. But that he caused the *making* of the entry is denied, as is any conclusion assuming that he had any part in its making. What fact, we ask, can be pointed to in this record, to indicate that respondent did any act to cause or induce the bookkeeper to make these entries in question?—to procure or cause the entry of these balances, or any balance, by the "innocent intermediary" the bookkeeper? We repeat, no doctrine

known to the law of principals, whether the general statute, or the innocent agent doctrine, reaches him. Only one way can exist, and that, to leap beyond the statute, as written, and to find aliunde *unexpressed intention* to punish him who *makes false* an entry independently made by another with whom he is not principal, and whom he did not procure to make the entry, and thus to invert and emasculate and extend by unwarranted construction, this plain statute.

We apprehend the opinion does not intend to claim, as a fact, that he did more than merely withhold the silp, and hence caused the falsity of the bookkeeper's later innocent entry. It is demonstrable, as we shall see, he did not do more, and had no part in the making of any entry, but only in doing that which resulted in its falsity, when made by another.

2. The premise on which the opinion proceeds, that respondent's act in withholding the deposit slips was "action from which" the entry made by the innocent bookkeeper "necessarily followed", is an erroneous assumption. That no entry *necessarily* followed until such time as respondent should turn in the withheld slip is positively true to the record. The account of National Life and Accident Insurance Company, (R. 20 Ex. 5) the basis for conviction on the 4th count, will make this error plain. Respondent received a $663.37 deposit in that account, but, "failed to turn in" the deposit slip. The old balance in that account was $1478.07. We do not contend, as remarked by the Court, that the act of withholding this slip "prevented entry",—it did not "prevent", but it did "look to prevention" *of*, entry in that account. If another had not *done acts which did cause entry*, despite respondent's withholding the slip, no entry, of course, would have resulted or been made. But the depositor *did cause*, by drawing five checks on its account that day, the new entry. By these five checks it

reduced its account $278.41, and as a result the bookkeeper, deducting that sum, made the new balance entry of $1199.-66,—the entry which respondent was convicted for "making." So, unmistakably, *respondent* did not *make* the entry, was not present, nor in *any sense* concerned in either "making" or "*causing to be made*" the entry, but it was caused to be made by the depositor, in consequence of its withdrawals. What *caused the entry*, independently of respondent or of his act, was the act of the depositor itself. We surely do not need to repeat, the act, and *only* act, of respondent *tended only to prevent* new entry until he should turn in the withheld slips, and, therefore, if his act were all, the *old balance* would have stood unchanged, no new entry required nor made. Surely, it will not be doubted that thus the *entry in question*, in that account, was brought about, and made by the bookkeeper, from these withdrawals, and not by respondent's withholding a slip of which the bookkeeper knew nothing. Surely, too, it will not be erroneously understood, in the face of these disclosed facts, and of most common knowledge, that no new balance entry would have been made in the account on the individual ledger if the depositor had not depleted its account. Surely, it will be understood and accepted that new entries are not made, "old balance" entries *not changed*, in individual ledger accounts, save when change occurs in the deposit balance. So there can be no question but the acts of others, and *not any* act of *respondent; caused the entry to be made.* We attempted to make this clear heretofore; and we now assume the Court so understands, and does not erroneously doubt the *new entry* was occasioned by the withdrawals, but has written only in what we conceive to be the erroneous view that respondent, having by his withholding caused the entry as later made not to reflect the true amount of the account, and hence to be false, is to be held guilty of *making*

the false entry notwithstanding the admitted fact his act did not cause the actual making of the entry, but merely caused its falsity when independently made by the bookkeeper. We earnestly suggest, however, respondent and the profession are entitled to have the holding made plain, to have it plainly said respondent had nothing to do with the actual physical act of making the entry in the book, but that this was done in entire independence of him and of his act of withholding the slip, despite his effort to prevent entries by the withholding; and we ask the Court to make this undisputed fact plain. It should be said, the record demands it be said, in order that the holding may be understood, that the undisputed facts establish respondent had no part in and no connection with, and did not cause nor induce, the physical entry to be made, and hence was in no sense principal with the actual physical fact of making the entry; true, too, the statute, as plain from its context and well decided in the Cochran case, penalizes only him who *makes*, only the *making* of the entry; but, because the remote act of respondent caused the entry to be false, when thus independently made by one not principal, the rule of strict construction is to be abrogated or so far relaxed as to punish him whose act does no more than to contribute to or cause the falsity of the independent entry, in disregard of the law of principals, because of the unexpressed intention of Congress to protect bank records from falsification by employees. We submit nothing short of such an interpretation can uphold the conviction. Assuming this point is not misunderstood, we consider whether, with this fact of respondent's non-participation in, and non-causation of, the actual, physical making of the entry accepted, it yet may be said by any rule of interpretation he can be guilty of *making* the false entry denounced by this statute.

3. The broad assumption in the opinion that by this statute it was the legislative "purpose to insure the correctness of bank records by prescribing punishment" for one who "independently brings about their falsification" is quite unjustified by the wording of the act. If such was the purpose, it yet cannot warrant a reading into the act a clause which it does not contain, nor the interpretation of the act to mean what it does not say.

No rule is better settled by the decisions of this Court than that, in construing a statute, the

> "intention must be gathered from the words, and they must be such as to leave no room for a reasonable doubt upon the subject." United States v. Corbett, 215 U. S. 233, 242.

The Corbett case is the case cited by this Court in its opinion as authority for the rule of construction; yet it says the intention "must be gathered from the words" of the statute.

> "To determine that a case is within the intention of the statute its language must authorize us to say so." United States v. Wiltberger, 5 Wheat 76, 96.
>
> "To get at the thought or meaning expressed in a statute—the first resort, in all cases, is to the natural significance of the words. If the words convey a definite meaning—then the meaning—must be accepted, and neither the courts nor the legislature have the right to add to it or take from it." Board vs. Rollins, 130 U. S. 662.
>
> "* * * to justify a departure from the letter of the law— the absurdity must be so gross as to shock the general moral or common sense—and there must be something to make plain the intent of Congress that the letter of the statute is not to prevail." Crooks vs. Harrelson, 282 U. S. 55, 60.

Cf. United States vs. Weitzel, 246 U. S. 533, 543; Fasulo vs. United States, 272 U. S. 620, 628, 629; United States vs. Sheldon, 2 Wheat 119, 121; United States vs. Goldenberg, 168 U. S. 95; United States vs. Standard Brewery, 251 U. S. 210, 217; Denn vs. Reid, 10 Peters 524, 527.

4. The adoption by the Court, in its opinion, of Webster's tertiary and special meaning of the word "make" in no degree helps to include the undisputed act of respondent within the purview of this plain statute. The admitted sum total of respondent's act, in relation to the transactions, was that he withheld and failed to turn in the deposit slips, as above made plain. This act admittedly was the cause of the *falsity* of the entry subsequently made by the uninformed bookkeeper. As above stated, however, it should be made plain in the opinion, that the scope of the statutory construction may be understood, that respondent had nothing whatever to do with the actual *making* of the entry,—neither had nor attempted authority nor direction over the bookkeeper, was not present and had in no manner contacted nor communicated with the bookkeeper who made the entry; that the act of respondent had neither the purpose nor effect of causing the physical entry to be made, but it was caused by the depositor's acts of withdrawal, in consequence of which the bookkeeper made his entry. In brief, respondent's act did not cause nor induce the entry, but only caused it to be false, when made, independently of him, by another.

We would say the phrase "to make an entry in a book" is so plain, and its meaning so clear, it needs no definition. But, accepting the definitional meaning by the Court, that the word "make", as there used, means "to cause to exist, appear, or occur,"—to give it such definition adds no whit to the cause against respondent. In the light of the un-

disputed record, it may be irrefutably stated respondent did not "cause to exist" nor "cause to appear", nor "cause to occur," the entries in question, nor either of them. How could one cause an entry to exist or appear, or occur, in a book, when he did not write it, and nothing he did looked to or had the effect of inducing or causing the entry *to be made*, but whose remote act of withholding information did no more than to result in the *falsity* of the entry, when subsequently made? Surely, Your Honors will not doubt the act of respondent did no more than that. A study of the record, in the light of these suggestions, cannot fail to convince, as for instance the simple insurance company account, that the withdrawals, and they alone, caused the entry to be made, and that the remote act of respondent—"the withholding and failure to report a deposit slip"—merely contributed to, or caused, the *falsity*, not the *making*, of the entry.

It might be conceded that respondent's withholding the slip would necessarily result in the *falsity* of the entry, when it should be made, if made before he should turn the slip in. In withholding the slip, he ran the risk withdrawals might occur, and hence that entry might be made, before he should turn in the slip. But it certainly cannot be said the withholding *necessarily resulted* in the *making* of an entry by the bookkeeper. This is not technical. It is but factual and fundamental, as established in this record.

We earnestly ask, in the light of this indisputable fact, that the Court find and state the facts on this question, in order, at all events, that the scope of the holding may be understood by the profession and judiciary. Let it be plainly said respondent's act of withholding was not, in truth, the cause of the actual making of the entry, and had no connection with it, but that his act did no more than to cause the *falsity* of the entry, when independently made

later by the bookkeeper, and in the making of which he had no part whatever; and then let it be seen whether any principle of law will leap so far as to interpret this plain statute (which this court has so truly said, in the Cochran case, punishes him, and him only, who *makes* a false *entry*) as to penalize an act which may not be said to cause the *making* of the entry, but which only causes it *to be false*, when made by another.

We are thus brought, by undisputed fact, to the following conclusions:

1. Respondent's act of withholding did not *cause an entry* to be made. Its *only* effect was that it would cause the entry in the ledger account (if one should be made while the slip was withheld) to *be false*.

2. It did *not* necessarily follow, from his act of withholding, that an entry would be made. While, if one were made meantime, it would be false, *whether* it should be made would depend on *extraneous and independent* acts, *not* of *respondent*, but of the *depositor* and *bookkeeper*, both. If the insurance company should make withdrawals, that *would* cause an entry, provided the recipient should report the fact to the bookkeper, and provided the latter should do his duty. It did withdraw, and that did cause entry. Respondent, in withholding the slip, but took a chance, or ran the risk, that an entry *might* occur, before he should turn it in; and if it *should* occur, it would be false. But his act in withholding *could* not, and *did* not, cause the entry, but at most only caused it to be false, when later made while the slip was withheld. So, the conclusion is inescapable that respondent neither made the entry, nor caused it to be made, and his act did not cause the entry to exist, nor appear, nor occur. Subsequent and wholly independent acts, which he had no part in, but naturally ran the risk of, caused the entry to be made,—to exist, appear, or occur.

The question is thus narrowed to the plain one, whether this statute penalizes an act which results in an entry, later independently made by another, being false, but which act *neither causes nor results in* the *entry being made.*

Is an act which neither amounts to the *making* or *causing to be made* of a false entry, but which merely omits to report a fact, and which *omission results* in the entry *being false* when another person independently makes it not knowing of the omission, the "making of a false entry", under the statute?

Since respondent neither made, nor caused to be made, the entry, since it was made by another without regard or relation to the fact he had done that which would make it false, if made, does this statute, the penalty imposed by which is "affixed to *him who makes* the false entry," penalize as well one whose prior act or omission, unrelated to the actual making of the entry, causes the entry by another to be false?

The decision in Morse v. United States, 174 Fed. 539, cited in Your Honors' opinion, we respectfully submit, does not reach, nor touch, the question. There the accused, head of the bank, the entrants his subordinates, devised the false scheme and directly caused the entries to be made. There the *actual entries, not* the mere falsity thereof, "necessarily resulted" from his direction to his subordinates. There he, as deviser of the scheme, put it into execution and directed it to completion. That he was *principal* in the offense no doubt can exist. His was not an act of withholding, or omitting to report, which resulted merely in the *falsity* of entries when they were made; but his act actually caused and directly resulted in the *making*, that is, the *actual writing*, of the entries.

The Court will, therefore, not fail to understand our point, when we say that the question for decision here was

not involved there; and that case is no authority for the question here. We, too, agree with the Morse decision. The question here, however, is *not* whether respondent caused the entries to be made; for that, by the undisputed facts, he did *not* do. The question here is quite different. It is, does the *making of an entry false* (which is *entirely different* from *making a false entry*, and which does not contemplate nor comprehend the fact the act consists of, or results in, the *actual making* of the entry) come within this statute which does not purport to punish, nor say that it punishes, the *making of an entry false*, but only the *making of a false entry*, and is hence, directed only *against the entrant?* Manifestly not. The rules for construction forbid it. We agree with this Court that no rule requires words to receive their narrowest meaning. But the very authority cited by the Court to support that rule, in conformity with so many pronouncements of this Court, announces that the intention must be gathered from the words of the statute, and "they must be such as to leave no room for a reasonable doubt upon the subject." "Before a man can be punished, his case must be plainly and unmistakably within the statute;" and "words may not be extended beyond their natural meaning in order to create an offense by construction merely." To hold that a statute which punishes only the *making* of the entry which is false, may be interpreted to punish as well him who did *not* make, nor *cause* the making of the entry, but whose act consisted only in doing that which resulted in its falsity when the innocent entrant independently made it is, we submit, to extend the statute beyond just limits of construction. One may take every of the many meanings of the word "make" as found in Webster's, or in Century, or any other, dictionary to which we have found access, of whatever extended dimensions, and yet it cannot be justly said that respondent made,

or caused to be made, the entry, because that is not true, under the disputed facts. His omission but resulted in the *falsity* of *another's* entry. Congress had the right and power to make this statute more comprehensive, and to include an act or omission which causes the falsity of an entry, even though made by another not principal with nor directed by the one who causes the falsity; but it did not do that. The English statute, pointed out to the Court in our brief, does punish the omission, and is clearly broad enough to have covered this case. We are justified in presuming that Congress was aware of the English statute; but it punished, by its enactment, *only him who makes* the entry which is false. It has not punished him whose only act causes or results in the falsity of another's entry.

We repeat, what was said in our brief, that if respondent and entrant had been principals, sharing the guilty mind, respondent could have been punished, and, as we think, under this indictment, because a principal. Had his act in withholding the slips, under the doctrine of innocent agent, accomplished the completed crime, in its direct causal connection, we would say he was sole principal, and should be punished. But it requires no argument to know he is not principal, either under the general statute, or under the innocent agent doctrine. The only possible way to hold him guilty is to supply, by construction, a clause which Congress has omitted, and this, of course, is unauthorized.

More need not be said. We have attempted to make plain the facts, heretofore misapprehended; and this Court will know that the principles we contend for apply.

Our conception is that this great Court, by its uniform adherence to accepted principles of constitutional and statutory construction, has thus far alone preserved our liberties, when those who would depart from rule and precedent would destroy them. As was said by the Texas

Court of Criminal Appeals, in reluctantly reversing conviction in aggravated case, (Smith vs. State, 113 Tex. Crim. Rep. 212) "we believe it imperative to adhere to the established rules of law." It is, therefore, we submit, less that an innocent man should suffer, and be ruined, than that salutary precedent and rule shall be preserved. Sincerely believing, therefore, that the opinion handed down misapprehends the effect of the undisputed facts, and the applicable principle, we respectfully pray, for respondent, the earnest consideration by Your Honors of what we have attempted to say, and for rehearing.

NAT L. HARDY,
WILL A. MORRISS,
San Antonio, Texas,
Attorneys for Respondent,
John J. Giles.

CERTIFICATE OF COUNSEL.

We, counsel for the above named John J. Giles, respondent, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

NAT L. HARDY,
WILL A. MORRISS,
Attorneys for John J. Giles, Respondent.